United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1006

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1006

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIE L. ROLAND,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Willie L. Roland appeals from a judgment of conviction entered on December 17, 1974, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 74 Cr. 996, filed in two counts on October 24, 1974, charged Roland in Count One with distribution of approximately an ounce of heroin on March 26, 1974, and in Count Two with distributing a slightly larger amount of heroin on June 14, 1974. Title 21, United States Code, Sections 812 and 841.

The trial commenced on November 20, 1974 and ended on November 21, when the jury returned a verdict of not guilty on Count One and guilty on Count Two.

On December 17, 1974, Roland was sentenced to three years in prison to be followed by three years special parole. At the time of sentence, Judge MacMahon denied Roland's request for bail pending appeal, and surrender was set for December 26, 1974. (231)* Since that time the date for surrender has been continually postponed because of Roland's hospitalization.

On January 8, 1975, this Court denied Roland's motion for bail pending appeal.

Statement of Facts

The Government's Case

The Government's case against Roland consisted primarily of the testimony of Detective Ralph Nieves. Nieves testified that he met Roland on March 26, 1974, through an informant. On that occasion Nieves, acting in an undercover capacity, agreed to purchase an ounce of heroin from Roland, and Roland, Nieves and the informant then drove to various locations in uptown Manhattan in an attempt to locate Roland's "connection." (15-16) They then returned to Roland's apartment. Soon thereafter, a black male arrived who went into the bedroom with Roland. Roland later left the apartment, returned, and gave a package to Nieves. Nieves weighed the package on a scale provided by Roland and paid him $1,500.00 in official advance funds. (16)

Nieves met Roland a number of times during the next two months. On one of those occasions, Roland gave him a telephone number at which he could be reached, and, when this number turned out to be incorrect, later gave him the correct number. On each of these meetings, the sale of

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* Figures in parenthesis refer to pages in the transcript.

further drugs was discussed but no transactions took place. (23-34)

On June 14, 1974, Nieves met Roland by arrangement at Roland's apartment and purchased a second ounce of heroin. Roland stated at the time that the heroin came from a different contact and was better quality, and that for this reason the price for the ounce was $1,800.00, which Nieves paid in official advance funds. (34-37)

Ernest Davis, also a detective with the New York City Police Department assigned to the New York Joint Task Force, testified that he drove Nieves to several of his meetings with Roland, that on one of these meetings Roland, whom he identified in the courtroom, was introduced to him, and that on June 14, 1974, he saw Nieves return from Roland's apartment with a small package of heroin. (91-95)

Following the testimony of Willie Roland, Special Agent Vincent Velotta testified for the Government in rebuttal. He particpated in the arrest of Roland on August 21, 1974, interviewed him at the office of the Drug Enforcement Administration later that day, and was present at an interview between the defendant and an Assistant United States Attorney. Velotta testified that in each of the interviews Roland admitted that he had sniffed heroin to ease the pain in his back. According to Velotta, Roland also admitted that on several occasions he had carried small packages from a friend of his known to him only as George, who had since died, to a Puerto Rican, but that he did not know what was in the packages.

The Defense Case

Willie Roland testified in his own behalf. (108-155.)

He admitted to having met Ralph Nieves, but stated that during those meetings he had not sold any drugs. Indeed, he stated that it was the informant and Nieves who

wished to sell drugs to him, although later in his direct testimony Roland stated that Nieves had wanted to buy drugs as well.

On cross-examination, Roland admitted that he had received small amounts of heroin to sniff as presents from George, and that George had importuned him on a number of occasions to find customers to whom George could sell heroin. However, Roland denied that George was his "connection," and denied that he had ever actually provided a customer for George or sold drugs himself.

ARGUMENT

POINT I

The Judge's Charge on Credibility of the Witnesses and the Jury's Responsibility Was Perfectly Proper.

Roland's first claim is that the District Judge committed reversible error by including in his charge the following sentence:

> Your most important function is to determine which witnesses you are going to believe, and this is so as to every witness, whether called by the Government or whether called by the defendant.

This claim, resting solely on an over-imaginative interpretation of a single sentence taken out of context from a complete and carefully delivered charge, is frivolous.

Roland's brief misleadingly excises this element of the judge's charge from both its immediate and its general context, in which it must be judged. *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *United States* v. *Pinto*, 503

F.2d 718, 724 (2d Cir. 1974). The sentence quoted above was immediately succeeded by the following language:

> You are not to give any greater credence to the Government witnesses simply because they are Police detectives, than you give to any other witness. You consider their testimony and measure its credibility by the same standards you apply to everybody else. (196)

It is thus immediately apparent that the District Judge did not intend to state, and could not have been understood by the jurors to have stated, that the jurors should believe the defense witnesses *or* the Government witnesses rather than weigh the evidence as a whole to determine whether the Government had met its burden of proof. The Judge was simply saying that the jurors should apply the guidelines on credibility of witnesses * to *each* witness, whether called by the Government or by the defendant.

Roland's claim becomes even more insignificant in the context of the entire charge. Judge MacMahon began his charge with a concise and careful admonition to the jurors that at all times the Government had the ultimate burden of proving the defendant guilty on all the evidence beyond a reasonable doubt:

> In short, I am the exclusive judge of the law. You, on the other hand, are the exclusive judge of the facts. You and you alone decide just what the facts are in this case. You decide what weight, and what effect you will give to the evidence. *You decide whether or not to believe a witness, and ultimately you decide whether the Government has sustained its burden of proving this defendant guilty beyond a reasonable doubt.* (194) (Emphasis added.)

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* The judge's discussion of credibility of witnesses consumes four pages in the record, 195-198. This care and thoroughness insured that the jurors understood their proper role and responsibility in deliberation.

Furthermore, after the instruction on credibility of witnesses discussed above, the trial judge charged the jury at some length (198-199) concerning the burden of proof on the Government and the requirements of proof beyond a reasonable doubt, including the following language relevant to the jurors' scrutiny of witnesses:

> You should review all of the evidence as you remember it, sift out what you believe, weigh it in the scale of your reasoning powers, and discuss it with your fellow jurors. (199)

Finally, at the end of the charge, the District Court admonished the jurors again that a verdict of guilty must be unanimous and that "if you find that the Government has failed to establish the guilty [sic] of the defendant beyond a reasonable doubt, you should acquit him." (205)

It is thus abundantly clear that the District Court's instructions scrupulously observed all the traditional requirements concerning charges on credibility of witnesses and the Government's burden of proof, and none of the decisions cited by Roland holds to the contrary. Roland relies principally on decisions concerning the alibi defense. Other circuits have in certain cases reversed judgments of conviction where the District Court in its instructions did not make sufficiently clear that the Government had the burden of proving beyond a reasonable doubt that the alibi was not true. *United States* v. *Booz*, 451 F.2d 719, 723 (3d Cir. 1971), *cert. denied*, 414 U.S. 820 (1972); *United States* v. *Beedle*, 463 F.2d 721, 724 (3rd Cir. 1972). *See also Stump* v. *Bennett*, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968) (charge that a jury had to find an alibi proved by a preponderance of the evidence before acquitting found unconstitutional). In this case, the District Court properly admonished the jury on several occasions that the Government at all times had the burden of proof as to all elements of the crime (195, 199, 200, 203,

205.) Since no defenses were raised by the defendant other than the failure of the Government to prove its case beyond a reasonable doubt, the cases cited by Roland in his brief are simply inapposite.*

The charge given by the District Court was thus perfectly proper in all respects.** Rejection of the contention implicit in Roland's argument—that the trial judge somehow by this single sentence in his charge suggested that an acquittal necessitated complete belief of Roland's testimony or utter disbelief of that of the agents—is compelled *a fortiori* by the holdings in a similar context in *Cupp* v. *Naughten, supra; United States* v. *Santana,* 485 F.2d 365, 371 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974), and

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* Roland's statement that "*this exact charge,* given where the defendant had presented an alibi, was held to be reversible error" (Appellant's Brief at 9) (emphasis added) is hyperbolic in the extreme, since the charges involved in the cases cited were radically diffrent from that given here. In *United States* v. *Beedle, supra,* the District Court charged the jury in part as follows:

> If you intend to acquit him you would have to find that you have a reasonable doubt that [the government witness'] story is not the correct one, that [the defendant] was there. In effect, you would have to disbelieve [the government witness] and believe [the defense witness].

463 F.2d at 724. This explicit instruction that a defense witness would have to be affirmatively believed before an acquittal could be found cannot by any stretch of the imagination be read into the sentence of the District Court's charge on which Roland focuses.

** Roland's reliance on *United States* v. *Clark,* 475 F.2d 240, 248, (2d Cir. 1973) and *United States* v. *Squires,* 440 F.2d 859, 867 (2d Cir. 1971), the only Second Circuit decisions cited in this portion of his brief, is equally misplaced. While Roland cites these cases for the proposition that Judge MacMahon's charge was in some way internally inconsistent, the cases themselves dealt with the failure of district judges to define in a logical and consistent manner the elements of the offenses with which the defendants were charged. Since instructions to jurors on that issue are judged with special scrutiny, see *United States* v. *Howard* — F.2d —, Dkt. No. 74-1282 (2d Cir., November 15, 1974), and since, as demonstrated above, the charge here was wholly consistent, this citation of precedent is unavailing.

United States v. *Isaacs*, 493 F.2d 1124, 1163-1164 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). See also *United States* v. *Rosa*, 493 F.2d 1191, 1195 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3210 (October 15, 1974).

Moreover, in the context of this case, even if Judge MacMahon's isolated statement did have the impact Roland asserts, ". . . the trial court did not err in opining that as to each of the charges the real issue was who to believe." *Hale* v. *United States*, 435 F.2d 737, 743 (5th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971). *Cf. United States* v. *Allied Stevedoring Corp.*, 241 F.2d 925, 934 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957). The defense in this case was nothing more than testimony of the defendant diametrically opposite to that of the undercover agent as to the first of the two sales of narcotics charged, of which Roland was acquitted. Whatever might be the prejudicial effect of a charge of the type Roland contends was given here in a case where "[a] defendant may only be claiming, or, alternatively to other claims, only be suggesting, that the customary difference between the testimony of prosecuting witness and the defendant has been occasioned by defects in the witnesses' perception or by inaccuracies of memory", *United States* v. *Hestie*, 439 F.2d 131, 132 (2d Cir. 1971), in the context of this case the statement under attack, even if construed as Roland would have it, poses no more than a theoretical possibility of prejudice. *United States* v. *Jenkins*, Dkt. No. 74-2257 (2d Cir., February 10, 1975), slip op. at 1768-1770. The correctness of this view is particularly established by the conceded (Roland Brief at 4) fact that, as to the June 14 sale of which Roland was convicted, Roland gave no testimony. In any event, any doubt that the jury had about the testimony of the agents—or "wavering", as Judge MacMahon characterized it in his charge (Tr. 199)—would have required acquittal under the charge as given (Tr. 199). That the jury understood this is demonstrated by Roland's acquittal of the March 26 sale charged in Count One, which Roland testified had never occurred.

POINT II

The Modified *Allen* Charge Given to the Jury was Proper. Roland's Claim That the Trial Judge's *Allen* Charge, Including The Statement That "[i]n a Large Portion Of Cases Absolute Certainly Cannot Be Expected," Was Improper Is Also Without Merit.

Judge MacMahon's so-called "modified" *Allen* charge, including the language objected to,* has been upheld as proper by this Court on several occasions. *United States* v. *Domenech*, 476 F.2d 1229, 1231-1232 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973); *United States* v. *Thomas*, 282 F.2d 191, 195 (2d Cir. 1960); see also *United States* v. *Cowles*, 503 F.2d 67 (2d Cir. 1974). Roland's arguments, having been already rejected by panels of this Court, are without merit here. *United States* v. *Martinez*, 446 F.2d 118, 119-120 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971).

CONCLUSION

The Judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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* This language, as the trial judge indicated in his charge (212), was quoted from the charge approved by the Supreme Court in *Allen* v. *United States*, 164 U.S. 492, 501 (1896).

Two copies received

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